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RHB TRUSTEES BHD v. ALWAYS AHEAD (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ATAN MUSTAFFA YUSSOF AHMAD J
[ORIGINATING SUMMONS NO: WA-24NCC-715-12-2023]
2 MAY 2024

B

Abstract – *(i) 'Local jurisdiction' in s. 3 of the Courts of Judicature Act 1964 refers to the territorial jurisdiction of the High Court in Malaya. The High Courts located in the various States are merely branches of the singular High Court in Malaya, and each branch has concurrent jurisdiction to entertain any civil proceedings in Malaya, regardless of where the cause of action arose. The choice of forum should enable parties to have easy access to court and facilitate speedy disposal of cases without causing undue hardship or inconvenience; (ii) A binding contract can be inferred from the conducts of the parties showing an intention to be bound, even if a formal agreement has yet to be signed. Where parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those agreed terms but propose to have the terms restated in a more formal document that is fuller or more precise but not different in effect, then the execution of the formal document is not a pre-condition to a binding contract. It is merely a formality to record the terms already agreed upon.*

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JURISDICTION: *Courts – High Court – Proper forum – Sale and purchase and lease back of property – Property located at Kulim, Kedah and vendor's place of business at Kulim – Signing of letter of offer in Kuala Lumpur – Whether cause of action arose in Kuala Lumpur – Whether High Court at Sungai Petani, Kedah proper forum – Whether location of property strong connecting factor in determination of forum – Whether High Court at Kuala Lumpur proper and more convenient forum – Courts of Judicature Act 1964, s. 23(1)*

G

CONTRACT: *Agreement – Concluded contract – Sale and purchase and leaseback of property – Non-execution of formal agreements – Whether terms of agreements concluded – Whether letter of offers and part performance to fulfil conditions of sale constituted binding contract – Whether conduct of parties demonstrated intention to be bound by agreement – Whether term 'subject to contract' and non-execution of formal agreements negated binding contract – Whether agreements subject to further negotiation – Whether term 'subject to contract' mere expression of desire to formalise agreed terms – Whether binding contract established*

H

CONTRACT: *Privity – Existence – Sale and purchase and leaseback of property – Third party acted on behalf of purchaser as trustee – Intention expressed in letter of offer – Whether third party had authority to negotiate and enter into contracts*

I

on behalf of purchaser – Whether vendor had knowledge of purchaser's interest in contract – Whether vendor estopped from denying purchaser's privity and locus standi

CONTRACT: *Specific performance – Claim for – Sale and purchase and leaseback of property – Non-execution of formal agreements – Whether conduct of parties demonstrated intention to be bound by agreement – Whether purchaser demonstrated continuous willingness and readiness to complete agreement – Whether vendor discharged evidential burden that damages were adequate remedy – Whether justice of case demands grant of specific performance – Specific Relief Act 1950, ss. 11, 20 & 21*

WORDS & PHRASES: *'subject to contract' – Meaning of – Inclusion of term in contract – Whether term 'subject to contract' and non-execution of formal agreements negated binding contract – Whether agreements subject to further negotiation – Whether term 'subject to contract' mere expression of desire to formalise agreed terms*

The primary issue in this application was the interpretation and enforcement of the binding contract constituted by the letter of offers and the draft agreements. It was the applicant's submission, *inter alia*, that: (i) at all material times, Axis Reit Managers Bhd ('Axis Reit Managers') was acting as an agent for the applicant and Axis Real Estate Investment Trust ('AXIS-REIT') in negotiating the purchase of the property and this was made known to the respondent from the outset. The applicant referred to the introduction in the letter of offer dated 20 March 2023 ('LO') which expressly defined the 'purchaser/lessor' as 'RHB Trustees Berhad as trustee ('RHB' or 'Trustee') for AXIS-REIT'. The applicant also relied on the Securities Commission's approval letter dated 25 January 2005 and the fourth principal deed dated 17 January 2020 executed between the applicant and Axis Reit Managers which set out the role of Axis Reit Managers as management company to deal with the investments of AXIS-REIT; (ii) the LO issued by Axis Reit Managers on behalf of the applicant and duly accepted by the respondent, together with the subsequent part performance and steps taken by both parties to fulfil the conditions of sale, constituted a binding contract; and (iii) the applicant was entitled to an order for specific performance to compel the respondent to execute the agreements as the respondent had breached the concluded contract by failing to do so. Damages would not be an adequate remedy as the property was unique and the applicant had already taken all steps necessary to complete the transaction, including signing the agreements and making arrangements to pay the balance deposit. On the other hand, the respondent submitted that: (i) the applicant had no privity of contract and therefore, had no *locus standi* to bring this application as the respondent's negotiations and dealings were only with Axis Reit Managers and not the applicant. The LO was issued by Axis Reit Managers and the affidavits in support were affirmed by an officer of Axis Reit Managers and not the

applicant. Since Axis Reit Managers and the applicant were separate legal entities, no enforceable contract could arise between the applicant and the respondent; (ii) there was no concluded contract as the LO was marked 'subject to contract' and the agreements had not been signed by both parties. The terms of the agreements were still being negotiated as seen from the multiple draft agreements circulated. The transaction was not a straightforward sale but involved a lease back arrangement with onerous obligations, and it had decided that the transaction did not align with its business plan; and (iii) specific performance should be refused as the transaction was not a straightforward sale but involved a complex lease back arrangement with onerous obligations on the respondent over many years. The respondent contended that the court should exercise its discretion not to grant specific performance as the contract was not suitable for specific enforcement akin to an employment contract. The respondent also raised a preliminary objection on the jurisdiction of this court to hear the present application. The respondent contended that the proper forum should be the High Court at Sungai Petani, Kedah as the subject property was located in Kulim, Kedah and the respondent's place of business was also in Kulim, Kedah. The respondent submitted that, based on s. 23(1) of the Courts of Judicature Act 1964, three out of the four connecting factors pointed towards the High Court in Sungai Petani, Kedah as the appropriate forum.

Held (granting orders for specific performance):

(1) This court should hear the matter as long as the court has jurisdiction, no injustice was caused to the respondent and the applicant had not instituted proceedings in the wrong court to gain an unfair advantage. The location of the subject property in Kulim, Kedah was not a strong connecting factor for the purposes of determining the most convenient forum to hear this specific performance application. While three of four factors in s. 23(1) of the CJA may connect to the Sungai Petani High Court, this court still retained jurisdiction as part of the cause of action did arise in Kuala Lumpur where the applicant's representative signed the LO. Hence, the KL High Court was the proper and more convenient forum to hear and determine the applicant's application for specific performance. The respondent's objection on the issue of jurisdiction was therefore, dismissed. (paras 8-10)

(2) The expressed intention as stated in the LO was for Axis Reit Managers to contract on behalf of the applicant as trustee of AXIS-REIT in purchasing the property from the respondent. The respondent, having had sight of the LO and the relevant corporate documents, must be taken to have knowledge of the applicant's interest in the contract and was therefore estopped from denying the applicant's privity and *locus standi*. The relationship between the applicant and Axis Reit Managers was analogous to that of a principal and agent, with Axis Reit Managers

having the authority to negotiate and enter into contracts on behalf of the applicant in the latter's capacity as the trustee of AXIS-REIT. In the circumstances, the applicant, as the disclosed principal and beneficiary, had the requisite privity and standing to bring this action against the respondent for specific performance of the contract. (paras 14, 16 & 18)

(3) There was a concluded contract between the applicant and the respondent for the sale and purchase of the property and leaseback of the property. A binding contract can still arise even where the phrase 'subject to contract' is used, if the subsequent conduct of the parties shows an intention to be bound. The 'subject to contract' marking in the LO was a mere expression of the desire of the parties to formalise the agreed terms in the agreements, and not a condition precedent to the formation of a binding contract. Therefore, there was a concluded contract between the applicant and the respondent for the sale and purchase of the property and leaseback of the property, and the respondent had breached the contract by failing to sign the agreements. The applicant was entitled to specific performance of the contract as it had shown its continuous willingness and readiness to perform its obligations thereunder. (paras 22 & 24-26)

(4) Although the LO was marked 'subject to contract', the subsequent conduct of both parties demonstrated their clear intention to be bound by the bargain struck. The LO duly accepted by the respondent on 23 March 2023 constituted a binding contract for the sale and purchase of the property notwithstanding the 'subject to contract' clause contained therein. The court is not precluded from finding a concluded contract in the face of such a clause if the subsequent conduct of the parties clearly indicates an intention to be bound. The contemporaneous documentary trail did not support the respondent's contention that parties were still in negotiations when the respondent purported to abort the deal on 31 July 2023. All the essential terms in the LO were finalised and the subsequent conduct of fulfilling conditions, finalising the draft agreements, and the applicant signing the agreements demonstrated their intention to be bound by the agreed bargain. (paras 29, 32, 34 & 36)

(5) The party seeking specific performance must not only demonstrate to the court its willingness and readiness to perform his obligation but must also adduce evidence thereof. The applicant had demonstrated a continuous willingness and readiness to complete the purchase of the property and lease back to the respondent as shown by the contemporaneous documentary evidence. The respondent, on the other hand, failed to discharge its evidential burden of showing why damages would be an adequate remedy. The respondent could not resile from the concluded bargain merely by stating the transaction no longer 'aligns

with its business plan'. Reneging due to pecuniary prejudice alone does not constitute a valid defence when a binding contract was struck. Therefore, the justice of the case demanded the grant of specific performance to compel the respondent to sign and complete the agreements. Pursuant to ss. 11, 20 and 21 of the Specific Relief Act 1950, orders for specific performance were granted. (paras 47, 48, 50, 51 & 54)

Case(s) referred to:

Ang Siew Hong & Anor v. Ang Wee Kiat [2020] CLJU 731; [2020] 1 LNS 731 HC ***(refd)***
Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC ***(dist)***
Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***
Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan Negeri Kedah [2007] 1 CLJ 498 CA ***(refd)***
Darlington Borough Council v. Wiltshier Northern Ltd & Anor [1995] 1 WLR 68 ***(refd)***
Kam Mah Theatre Sdn Bhd v. Tan Lay Soon [1994] 1 CLJ 1 SC ***(dist)***
Kheamhuat Holdings Sdn Bhd v. The Indian Association, Penang [2006] 2 CLJ 1040 CA ***(dist)***
Lim Keng Siong & Anor v. Yeo Ah Tee [1983] 1 CLJ 233; [1983] CLJ (Rep) 231 FC ***(refd)***
Low Kar Yit & Ors v. Mohamed Isa & Anor [1963] CLJU 77; [1963] 1 LNS 77 HC ***(dist)***
Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd [1989] 2 CLJ 142; [1989] 1 CLJ (Rep) 154 SC ***(refd)***
Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd [1987] CLJU 55; [1987] 1 LNS 55 HC ***(refd)***
Voo Syun Mui v. Yap Mooi Mooi [1984] 2 CLJ 167; [1984] 1 CLJ (Rep) 457 FC ***(refd)***
Wong Kup Sing v. Jeram Rubber Estates Ltd [1969] CLJU 201; [1969] 1 LNS 201 HC ***(refd)***
Yap Seong Yee v. Eureka Property Management Sdn Bhd & Another Appeal [2018] 8 CLJ 713 CA ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 3, 23(1)
Federal Constitution, art. 121(1)
Specific Relief Act 1950, ss. 11(1)(c), (2), 20, 21

For the applicant - Kalearasu K Veloo & Eva Chang Chon Peng; M/s SF Chan & Co
For the respondent - CK Ung; M/s Phee, Chen & Ung

[Editor's note: This judgment is to be read together with the judgment of the same case published in RHB Trustees Bhd v. Always Ahead (M) Sdn Bhd (No 2) [2024] 9 CLJ 443.]

Reported by S Barathi

JUDGMENT

Atan Mustaffa Yussof Ahmad J:

[1] Enclosure 1 is allowed. Order in terms is given for prayers (a), (b), (c) and (f). Costs of RM15,000 is ordered for the applicant on a standard basis. My broad grounds are as below.

Jurisdiction Of The High Court Of Malaya In Kuala Lumpur

[2] The respondent raised a preliminary objection on the jurisdiction of this court to hear the present application. The respondent contended that the proper forum should be the High Court in Sungai Petani, Kedah as the subject property is located in Kulim, Kedah and the respondent's place of business is also in Kulim, Kedah. The respondent submitted that based on s. 23(1) of the Courts of Judicature Act 1964, the High Court in Malaya shall have jurisdiction in civil proceedings where the cause of action arose, where the defendant resides or has its place of business, where the facts on which the proceedings are based exist or are alleged to have occurred, or where the land in dispute is situated, within the local jurisdiction of the court. The respondent argued that on the facts, three out of the four connecting factors point towards the High Court in Sungai Petani, Kedah as the appropriate forum.

[3] In response, the applicant submitted that since the respondent had entered appearance in this proceeding and did not apply to transfer the matter to the High Court in Sungai Petani, the respondent must be taken to have submitted to the jurisdiction of this court and is estopped from raising any jurisdictional challenge at this stage. The applicant contended that the KL High Court is the more appropriate forum as the applicant's office and its solicitors are located in Kuala Lumpur and the applicant's representative had signed the letter of offer in Kuala Lumpur. The applicant further argued that based on the nature of the application, which essentially involved the interpretation of documents, there was no necessity for any witness testimony and therefore no prejudice to the respondent for the matter to be heard in this court.

[4] It is trite law that the jurisdiction of the High Court in civil proceedings shall be determined by reference to the factors stipulated in s. 23(1) of the Courts of Judicature Act 1964. In *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1987] CLJU 55; [1987] 1 LNS 55, the High Court held that the definition of "local jurisdiction" in s. 3 of the Courts of Judicature Act 1964 refers to the territorial jurisdiction of the High Court in Malaya.

[5] The court in *Sova Sdn Bhd* clarified that the High Courts located in the various States are merely branches of the singular High Court in Malaya, and each branch has concurrent jurisdiction to entertain any civil proceedings in Malaya, regardless of where the cause of action arose. This is based on art. 121(1) of the Federal Constitution, which vests judicial power only in two High Courts – the High Court in Malaya and the High Court in Borneo. The court went on to state that although jurisdiction exists, the court before which a matter is instituted may not be the proper or convenient forum to determine the dispute. The choice of forum should enable parties to have easy access to court and facilitate the speedy disposal of cases without causing undue hardship or inconvenience.

[6] Applying the above principles, I am of the considered view that the KL High Court is the proper forum to hear the present application. As rightly submitted by the applicant, the respondent had failed to raise any objection on the issue of jurisdiction when entering appearance in this action and did not take any steps to apply for a transfer of the proceedings to the Sungai Petani High Court. The respondent must therefore be deemed to have acquiesced to the jurisdiction of this court and is estopped from raising this challenge as an afterthought at the hearing of the application.

[7] In any event, upon a careful consideration of the connecting factors, I find that the KL High Court is the more appropriate forum to determine the present dispute. The affidavit evidence shows that the letter of offer which forms the basis of the contract was signed by the applicant's representative in Kuala Lumpur. A substantial part of the cause of action therefore arose in Kuala Lumpur. The applicant's office and its solicitors, who were involved in the negotiations and preparations of the relevant agreements, are also based in Kuala Lumpur. This means that the majority of the potential witnesses who may need to testify, if required by the court, are located in Kuala Lumpur.

[8] Further, as correctly highlighted by the applicant, the primary issue in this application is the interpretation and enforcement of the binding contract constituted by the letter of offer and the draft agreements. The hearing would predominantly be based on the affidavit evidence without the necessity for *viva voce* testimony from witnesses. The location of the subject property in Kulim, Kedah is not a strong connecting factor for the purposes of determining the most convenient forum to hear this specific performance application.

[9] This court should hear the matter as long as the court has jurisdiction, no injustice is caused to the respondent, and the applicant has not instituted proceedings in the wrong court to gain an unfair advantage. Forcing the applicant to start fresh proceedings in another court would entail further expense and waste of time, which should be avoided unless there are strong reasons requiring a transfer. On the facts, while three of the four factors in s. 23(1) may connect to the Sungai Petani High Court, this court still retains jurisdiction as part of the cause of action did arise in Kuala Lumpur, where the applicant's representative signed the letter of offer. No palpable injustice has been alleged by the respondent for the matter to be heard here as the dispute revolves around questions of contractual interpretation based on affidavit evidence. The respondent is legally represented and had not previously raised any complaint on the choice of forum. There is also no suggestion that the applicant had commenced the action in the KL High Court to gain any advantage over the respondent. Therefore, the scale tilts in favour of allowing the matter to proceed before this court rather than transferring it elsewhere, as such an approach prevents duplicative proceedings and promotes efficiency in the administration of justice.

[10] In the circumstances and on a balance of factors, I am satisfied that the KL High Court is the proper and more convenient forum to hear and determine the applicant's application for specific performance. The respondent's objection on the issue of jurisdiction is therefore dismissed.

Privity Of Contract And *Locus Standi*

[11] The respondent submitted that the applicant has no privity of contract and therefore no *locus standi* to bring this application as the respondent's negotiations and dealings were only with Axis REIT Managers Berhad ("Axis REIT Managers") and not the applicant. The respondent contended that the letter of offer dated 20 March 2023 was issued by Axis REIT Managers and the affidavits in support were affirmed by an officer of Axis REIT Managers and not the applicant. The respondent argued that since Axis REIT Managers and the applicant are separate legal entities, no enforceable contract can arise between the applicant and the respondent.

[12] In response, the applicant submitted that at all material times, Axis REIT Managers was acting as an agent for the applicant and AXIS-REIT in negotiating the purchase of the property and this was made known to the respondent from the outset. The applicant referred to the introduction in the letter of offer, which expressly defined the "purchaser/lessor" as "RHB Trustees Berhad as trustee ("RHB" or "trustee") for Axis Real Estate Investment Trust ("AXIS-REIT")". The applicant also relied on the Securities Commission's approval letter dated 25 January 2005 and the fourth principal deed dated 17 January 2020 executed between the applicant and Axis REIT Managers, which set out the role of Axis REIT Managers as management company to deal with the investments of AXIS-REIT.

[13] I agree with the applicant's submission that it has the requisite privity of contract and *locus standi* to commence this action against the respondent. The relationship between the applicant and Axis Reit Managers *vis-à-vis* the Axis-REIT fund and the authority of Axis Reit Managers to contract on behalf of the applicant as trustee of AXIS-REIT were clearly disclosed to the respondent in the letter of offer. The introduction to the letter of offer unequivocally identified the applicant as the "purchaser/lessor" of the property in its capacity as trustee of AXIS-REIT. Although the letter of offer was issued by Axis Reit Managers, it was expressly stated to be "for and on behalf of the purchaser", *ie*, the applicant.

[14] The relationship between the applicant and Axis Reit Managers is analogous to that of a principal and agent, with Axis Reit Managers having the authority to negotiate and enter into contracts on behalf of the applicant in the latter's capacity as trustee of AXIS-REIT. This is made clear in the fourth principal deed dated 17 January 2020 which defined the role of the applicant as trustee to hold the investments of AXIS-REIT and the role of Axis Reit Managers as management company to deal with such investments.

[15] In *Darlington Borough Council v. Wiltshier Northern Ltd & Anor* [1995] 1 WLR 68, the English Court of Appeal addressed the issue of whether a third party who was not a party to a construction contract could recover substantial damages from the contractor for defective work, where the contract was entered into for the third party's benefit. The case concerned a construction contract where a finance company entered into building contracts with a contractor to construct a recreational centre for the benefit of a third-party council on the council's land. An issue that arose was whether the third-party council, who was not a party to the building contracts, could recover substantial damages from the contractor for alleged defective work. The court held that since the building contracts were entered into for the council's benefit and it was foreseeable that damage caused by breaches would cause loss to the council, the council could recover substantial damages from the contractor as the assignee of the finance company's rights against the contractor, with damages to be assessed as if the council had been a party to the contracts. Steyn LJ stated:

> The case for recognising a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties ...

[16] On the facts, the expressed intention, as stated in the letter of offer, it is for Axis Reit Managers to contract on behalf of the applicant as trustee of AXIS-REIT in purchasing the property from the respondent. The respondent, having had sight of the letter of offer and the relevant corporate documents, must be taken to have had knowledge of the applicant's interest in the contract and is therefore estopped from denying the applicant's privity and *locus standi*. The respondent's attempt to dissect the relationship between the applicant and Axis Reit Managers is an afterthought to evade its contractual obligations and cannot be sustained.

[17] In any event, even if there is no strict privity of contract, this is an appropriate case to apply the principle enunciated in *Darlington Borough Council v. Wiltshier Northern Ltd & Anor* to grant the applicant the necessary standing to enforce the contract entered into by Axis Reit Managers for its benefit. There is no prejudice to the respondent in doing so as it had at all times been aware that the applicant is the purchaser and ultimate beneficiary of the contract. To deny the applicant the relief of specific performance in the circumstances would be to sanction the respondent's attempt to renege on the contract on a mere technicality.

[18] In the circumstances, I find that the applicant, as the disclosed principal and beneficiary, has the requisite privity and standing to bring this action against the respondent for specific performance of the contract.

Concluded Contract For The Sale And Purchase Of The Property And Lease Back Of The Property

[19] The applicant, as trustee of AXIS-REIT, applied for specific performance of the sale and purchase agreement, master sublease agreement and related documents (collectively "the agreements") against the respondent. The applicant contended that there was a concluded contract between the parties for the sale and purchase of the property and leaseback of the property, notwithstanding that the respondent had not signed the formal agreements.

[20] The applicant submitted that the letter of offer dated 20 March 2023 issued by Axis Reit Managers on behalf of the applicant and duly accepted by the respondent on 23 March 2023, together with the subsequent part performance and steps taken by both parties to fulfil the conditions of sale, constituted a binding contract. The applicant pointed to the payment of the earnest deposit of RM1,840,000 to the stakeholder on 30 March 2023, the completion of the due diligence audit, the procurement of approvals from Perbadanan Kemajuan Negeri Kedah ("PKNK"), and the agreement on the terms of the agreements around 22 July 2023. The applicant further highlighted that it had signed the agreements and made arrangements to pay the balance deposit, and contended that the only act left to be done was for the respondent to sign the agreements.

[21] The respondent submitted that there was no concluded contract as the letter of offer was marked "subject to contract" and the agreements had not been signed by both parties. The respondent contended that the letter of offer merely obliged the parties to negotiate further, but there was no binding contract until the terms were finalised and the documents were signed. The respondent argued that the terms of the agreements were still being negotiated, as seen from the multiple draft agreements circulated. The respondent also submitted that the transaction was not a straightforward sale but involved a lease back arrangement with onerous obligations, and it had decided that the transaction did not align with its business plan.

[22] Having considered the submissions of both parties and the contemporaneous documentary evidence, I am of the view that there was a concluded contract between the applicant and the respondent for the sale and purchase of the property and leaseback of the property. A binding contract can be inferred from the conducts of the parties showing an intention to be bound, even if a formal agreement has yet to be signed. This is supported by the Court of Appeal decision in *Cipta Cermat Sdn Bhd v. Perbadanan Kemajuan*

Negeri Kedah [2007] 1 CLJ 498, where the court held that despite the want of a duly executed formal agreement, a concluded contract can exist if there was an offer, acceptance, consideration, certainty of parties, property and price, coupled with unequivocal acts of part performance referable to the existing contract between the parties. The acts of part performance here, such as payment of deposits, conducting due diligence, procuring approvals *etc*, demonstrate the parties' intention to be bound by the terms agreed upon, even though formal documentation was yet to be finalised and signed. Therefore, applying the principles from *Cipta Cermat*, the phrase "subject to contract" in the letter of offer does not negate the conclusion that the parties had already entered into a binding agreement through their words and conduct.

[23] On the facts, the unequivocal acts of part performance by both the applicant and respondent are clearly referable to an existing contract to sell and purchase the property on the terms of the letter of offer duly accepted by the respondent on 23 March 2023. These acts include the payment of the earnest deposit by the applicant, the completion of the due diligence audit, the procurement of PKNK's approvals, and the agreement on all terms of the agreements around 22 July 2023. The applicant's solicitors had, on 22 July 2023, asked both parties to sign the agreements in escrow pending exchange, which the respondent did not object to. The applicant had duly signed the agreements and made arrangements to pay the balance deposit, evincing its willingness and readiness to complete the contract.

[24] I do not think the "subject to contract" marking in the letter of offer negates the existence of a concluded contract in light of the clear acts of part performance. It is well-established that a binding contract can still arise even where the phrase "subject to contract" is used, if the subsequent conduct of the parties shows an intention to be bound. This was made clear by Edgar Joseph Jr SCJ in *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133:

> True it is that merely because the parties contemplate the preparation of a formal contract that by itself will not prevent a binding contract from coming into existence before the formal contract is signed. It is not difficult to cite an anthology of cases for this proposition but we need no more than refer to *Von Hatz Feldt-Wildenburg v. Alexander* [1912] 1 Ch 284, (at pp. 288, 289) where the Court said this:
>
> It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplates the execution of a further contract between the parties it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case, there is a binding contract and reference to the more formal document may be ignored.

[25] I am of the view that on a proper construction, the "subject to contract" marking in the letter of offer is a mere expression of the desire of the parties to formalise the agreed terms in the agreements, and not a condition precedent to the formation of a binding contract. The terms of the letter of offer are sufficiently certain and complete to constitute a valid contract to sell the property, with the execution of a formal agreement being the manner in which the transaction already agreed will be carried out. The subsequent email correspondence between the parties' solicitors from 22 July 2023 onwards clearly indicates that all terms had been finalised pending execution of the agreements in escrow. The respondent's eleventh-hour notice on 31 July 2023 that it no longer wished to proceed with the transaction because it did not align with its business plan does not change the fact that a binding contract had already been reached.

[26] Therefore, I find that there was a concluded contract between the applicant and the respondent for the sale and purchase of the property and leaseback of the property, and the respondent had breached the contract by failing to sign the agreements. The applicant is entitled to specific performance of the contract as it has shown its continuous willingness and readiness to perform its obligations thereunder.

"Subject to Contract" Clause

[27] The respondent contended that the letter of offer dated 20 March 2023 did not constitute a binding contract but was merely an agreement to further negotiate as it contained the words "subject to contract". The respondent argued that this meant that parties were still negotiating and did not intend to be bound until a formal agreement was executed. The respondent relied on the cases of *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises* (*supra*), *Low Kar Yit & Ors v. Mohamed Isa & Anor* [1963] CLJU 77; [1963] 1 LNS 77; [1963] MLJ 165, *Kam Mah Theatre Sdn Bhd v. Tan Lay Soon* [1994] 1 CLJ 1; [1994] 1 MLJ 108 and *Kheamhuat Holdings Sdn Bhd v. The Indian Association, Penang* [2006] 2 CLJ 1040; [2006] 4 MLJ 656 to submit that where the words "subject to contract" are used, there is no enforceable contract until the execution of a formal agreement.

[28] The applicant submitted that notwithstanding the words "subject to contract", a binding contract had been reached between the parties as evinced by their subsequent conduct in performing the conditions of sale and finalising the terms of the agreements. The applicant relied on case law establishing that the court can infer a binding contract from the acts of part performance and exchanges between the parties where it is clear that a complete agreement had been reached. The applicant contended that the words "subject to contract" should be construed as a mere expression of the desire of the parties to record the agreed terms in a formal document and not a condition precedent to contract formation.

[29] On a thorough consideration of the evidence and the law, I am of the view that the letter of offer duly accepted by the respondent on 23 March 2023 does constitute a binding contract for the sale and purchase of the property, notwithstanding the "subject to contract" clause contained therein. It is well-established that the court is not precluded from finding a concluded contract in the face of such a clause if the subsequent conduct of the parties clearly indicates an intention to be bound.

[30] The legal principles are aptly summarised by the Federal Court in *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625, where the court held that the phrase "subject to contract" does not necessarily negate contract formation if the overall correspondence and conduct shows the parties intended to be bound immediately. The court must examine the circumstances of each case to determine if the "subject to contract" clause was intended by parties to be a mere expression of their desire to formalise already agreed terms, or a condition precedent to binding themselves. Where the parties have identified the subject matter, price, essential terms *etc*, with sufficient clarity, the court can find an enforceable "open contract" despite the absence of a formal document, and imply necessary terms to give effect to the parties' objective intentions.

[31] In *Voo Syun Mui v. Yap Mooi Mooi* [1984] 2 CLJ 167; [1984] 1 CLJ (Rep) 457, the Federal Court held that based on the evidence and conduct of the parties, their intention was clearly to arrive at a definite and complete agreement for the sale of the property. The mere fact that the option to purchase was stated to be "subject to an agreement to be signed" did not necessarily mean there was no legally binding and enforceable agreement yet. Applying *Lim Keng Siong & Anor v. Yeo Ah Tee* [1983] 1 CLJ 233; [1983] CLJ (Rep) 231; [1983] 2 MLJ 39, the court found that the parties intended to be bound by the terms in the option letter. The respondent had validly exercised the option by tendering the 10% deposit within the stipulated period, which the appellant had wrongfully rejected. Therefore, the court dismissed the appellant's argument that there was no concluded contract since no formal sale agreement had been signed. The intention, based on evidence, was clearly to create binding obligations.

[32] Applying the principles from these cases to the facts of this case, although the letter of offer was marked "subject to contract", the subsequent conduct of both parties demonstrates their clear intention to be bound by the bargain struck. The certainty of terms is evidenced by the applicant's payment of the earnest deposits, completion of the due diligence, procurement of approvals from PKNK, and drafting of final executable agreements. The email exchanges from July 2023 dealt merely with the logistics of signing, not substantive negotiations, indicating parties had moved to the execution stage of a concluded agreement. The unequivocal acts of part performance, such as the applicant signing the agreements, show an intention to create binding obligations, with the "subject to contract"

phrase being just an expression to formally record already agreed terms, not a condition rendering the entire bargain non-binding until documentation. Therefore, having regard to the overall factual matrix, it is clear that a complete and binding contract was reached between the applicant and respondent on the essential terms of the sale and lease back as per the duly accepted letter of offer dated 23 March 2023, despite the respondent's failure to ultimately sign the formal agreements.

[33] The words "subject to contract" when viewed in light of cl. 2(F) of the letter of offer did not negate the existence of a binding contract but merely expressed the parties' intention to record the agreed terms in a more formalised document. Clause 2(F) states:

> Parties shall immediately upon the Vendor's acceptance of the Offer proceed to negotiate and mutually agree on all the terms and conditions of the SPA. Subject to all terms being finalized and mutually agreed between the parties, and the other conditions stipulated in paragraph (B) above having been fulfilled within the said Period, the parties shall proceed with the execution of the SPA within fourteen (14) working days thereafter.

[34] The evidence shows that parties had expeditiously proceeded to finalise and mutually agree on the terms of the sale and purchase agreement ("SPA") after the respondent accepted the letter of offer on 23 March 2023, with all terms being agreed by 22 July 2023 in readiness for execution by 26 July 2023. The contemporaneous documentary trail does not support the respondent's contention that parties were still in negotiations when the respondent purported to abort the deal on 31 July 2023.

[35] In considering whether the words "subject to contract" in the letter of offer prevented the formation of a binding contract, I considered the parties' true intentions. Where parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those agreed terms, but propose to have the terms restated in a more formal document that is fuller or more precise but not different in effect, then the execution of the formal document is not a pre-condition to a binding contract. It is merely a formality to record the terms already agreed upon.

[36] The parties had finalised all the essential terms in the letter of offer and the subsequent conduct of fulfilling conditions, finalising the draft agreements, and the applicant signing the agreements demonstrates their intention to be bound by the agreed bargain. The execution of the formal sale and purchase agreement was not a pre-condition, but just a recording of the terms they had already accepted.

[37] Support for this conclusion can be found in the respondent's own solicitors' letter dated 31 July 2023, which made no mention of any outstanding terms remaining to be negotiated. The reason given by the

respondent for not proceeding was that the transaction allegedly did not align with its business plans, thereby implying that the substantive deal had already been struck and accepted by the respondent, with only the formality of signing remaining.

[38] Therefore, I find that the "subject to contract" phrase in the initial letter of offer did not prevent the formation of a binding contract between the parties once they had performed the substantive agreed obligations and accepted the negotiated terms by July 2023. The formal agreements were just a recording formality at that stage.

[39] The respondent's reliance on *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises* (*supra*) is misplaced as the facts are clearly distinguishable. That case involved an informal agreement that was "subject to a written contract to be executed" and the Supreme Court found that parties had not even commenced negotiations on the terms of the written contract. In contrast, parties in the present case had diligently proceeded to agree on the terms of the agreements and were already making arrangements for execution when the respondent had a change of heart.

[40] The High Court case of *Low Kar Yit & Ors v. Mohamed Isa & Anor* does not assist the respondent. In *Low Kar Yit*, the option itself was made "subject to a formal contract to be drawn up and agreed upon by the parties". This condition that a formal contract must be agreed upon preceded any binding agreement. However, here, the letter of offer was accepted by the respondent on 23 March 2023. This acceptance, coupled with the subsequent fulfillment of conditions like payment of deposits, due diligence, obtaining approvals, and finalising the draft agreements, indicates the formation of a binding contract. The requirement to sign formal agreements was not a pre-condition to contract formation in the instant case. Rather, it was merely the final step to execute an already concluded bargain, as evidenced by the parties' conduct in performing the contractual obligations. Unlike *Low Kar Yit*, this instant case does not involve an option that was expressly "subject to" agreeing on a formal contract first. The letter of offer itself, once accepted, constituted a binding agreement, with the formal documentation being a record of finalised terms. The chronology of events and acts of part performance by both parties here suggest that the formal contract signing was not a condition precedent, but rather an expression of the parties' desire to have the already-agreed terms formally recorded.

[41] Further, the Supreme Court case of *Kam Mah Theatre Sdn Bhd v. Tan Lay Soon* does not assist the respondent. In *Kam Mah Theatre*, the proviso stating "the sale and purchase agreement shall incorporate all the terms and conditions herein and other usual terms and conditions and shall be signed on or before 18 March 1989" was found to be equivalent to the phrase "subject to contract". This raised a strong presumption that a further formal

contract was necessary. However, in this present case, there is no such proviso or phrase equivalent to "subject to contract" in the letter of offer accepted by the respondent on 23 March 2023. The letter of offer itself constituted the basis of the agreement. In *Kam Mah Theatre*, the court found cogent evidence that negotiations were still ongoing between the parties, such as the additional conditions in the draft agreement, correspondence indicating lack of finality, *etc*. In contrast, here, the evidence suggests the parties had finalised all terms and simply needed to sign the formal agreements. The conduct of fulfilling conditions like payment of deposits, due diligence, obtaining approvals from PKNK, *etc*, indicates the parties had taken steps to perform the already concluded contract. The ambiguity around "usual terms and conditions" in *Kam Mah Theatre* is absent in this instant case, where the essential terms of the sale and lease back were clearly spelled out in the letter of offer itself. While *Kam Mah Theatre* raised doubts about contract formation, here, the chronology of events and acts of part performance strongly suggests that the formal contract signing was not a condition precedent, but merely the final step to record the already concluded bargain.

[42] The case of *Kheamhuat Holdings Sdn Bhd v. The Indian Association, Penang* also does not assist the respondent's case in this dispute. In fact, the Court of Appeal's reasoning in dismissing the appeal in *Kheamhuat* actually supports the applicant position's that there is a binding contract. The key points of distinction are:

(i) the Court of Appeal in *Kheamhuat* held that the MOU in that case was nothing more than a basis for negotiations and the parties did not intend to be bound until a formal agreement was executed. This was because the MOU itself was expressly subject to a formal agreement being concluded between the parties after their lawyers have studied and advised on the matter.

(ii) in contrast, the letter of offer in the instant case, while having the words "subject to contract", contains detailed terms on the essential elements of the transaction like price, property, completion timeline, and is not expressly stated to be subject to a future formal agreement. The letter of offer appears intended to be a comprehensive agreement.

(iii) crucially, in *Kheamhuat*, none of the conditions precedent set out in the MOU like obtaining the consent of members and the court were fulfilled. The Court of Appeal held that this meant there was no legally binding contract.

(iv) however, in the instant case, it is the applicant's case that all conditions of the letter of offer were fulfilled by both sides, like conducting due diligence, procuring third party consent, paying deposit, and finalising the terms of the formal agreements. Unlike *Kheamhuat*, this points to an intention to be bound.

(v) the Court of Appeal in *Kheamhuat* emphasised that even if members had purported to waive the requirement of court approval for dealings with the association's property, such waiver would be *ultra vires* the memorandum and articles and invalid. The constitutional documents had to be complied with.

(vi) this reasoning is not applicable to the instant case. There is no suggestion that the parties' performance of the conditions in the letter of offer, like the applicant paying the deposit or conducting due diligence, would be *ultra vires* or invalid under either party's constitution.

(vii) finally, the Court of Appeal found that the conduct of only two individuals who tried to push through the agreement could not be attributed to the whole management committee or the association to establish a binding contract by conduct.

(viii) in contrast, the acts of part performance in the instant case, like paying deposits, procuring approvals and executing agreements, appear to be institutional acts attributable to the applicant and respondent as corporate entities, and not just acts of individual office bearers.

[43] Therefore, in light of the clear acts of part performance and the advanced stage of the documentations, I find that the letter of offer duly accepted on 23 March 2023 did constitute a binding contract between the applicant and the respondent, with the "subject to contract" clause to be construed as an expression of the desire to formally record the agreed terms rather than a condition precedent to contract formation.

Suitability Of Specific Performance Order

[44] The applicant submitted that it was entitled to an order for specific performance to compel the respondent to execute the agreements as the respondent had breached the concluded contract by failing to do so. The applicant contended that damages would not be an adequate remedy as the property was unique and the applicant had already taken all steps necessary to complete the transaction, including signing the agreements and making arrangements to pay the balance deposit. The applicant relied on ss. 11(1) and 11(2) as well as illustrations (a) to s. 11(1)(c) of the Specific Relief Act 1950 to argue that specific performance should be granted as a matter of course for contracts relating to immovable property.

[45] The respondent argued that specific performance should be refused as the transaction was not a straightforward sale but involved a complex leaseback arrangement with onerous obligations on the respondent over many years. The respondent contended that the court should exercise its discretion not to grant specific performance as the contract was not suitable for specific enforcement akin to an employment contract.

[46] I shall begin by setting out the applicable legal principles. Section 11(1) of the Specific Relief Act 1950 provides that subject to the provisions in the Act, specific performance of a contract may in the discretion of the court be enforced when (a) there exists no standard for ascertaining actual damage caused by non-performance; or (b) pecuniary compensation for non-performance would not afford adequate relief. Section 11(2) further provides that the court shall presume, unless the contrary is proven, that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money. Illustration (a) to s. 11(1)(c) makes it clear that a contract for the sale of a house at a stated price is specifically enforceable at the election of the purchaser.

[47] The Court of Appeal in *Yap Seong Yee v. Eureka Property Management Sdn Bhd & Another Appeal* [2018] 8 CLJ 713 had the occasion to consider the principles governing the grant of specific performance. Citing the Federal Court case of *Wong Kup Sing v. Jeram Rubber Estates Ltd* [1969] CLJU 201; [1969] 1 LNS 201; [1969] 1 MLJ 245, the Court of Appeal held that before granting specific performance, the court must be satisfied that there is a continuance of readiness and willingness on the part of the party seeking such relief to perform his part of the bargain from the date of the contract up to the date of hearing. The party seeking specific performance must not only demonstrate to the court its willingness and readiness to perform his obligation but must also adduce evidence thereof.

[48] On the present facts, I find that the applicant had demonstrated a continuous willingness and readiness to complete the purchase of the property and leaseback to the respondent. The contemporaneous documentary evidence shows that the applicant had conscientiously taken all steps to finalise and execute the agreements and to fulfil the conditions of sale, including paying the earnest deposit, completing the due diligence, procuring approvals from PKNK, and arranging to pay the balance deposit. The applicant had by 26 July 2023 signed all the agreements and was merely awaiting the respondent's counter-parts when the respondent purported to renege on the transaction. The applicant had, *via* its solicitors' letter dated 3 August 2023, called upon the respondent to sign the agreements and proceed with completion, but to no avail.

[49] The respondent's argument that specific performance is unsuitable due to the nature and duration of the transaction is unmeritorious. This is not a case akin to the enforcement of employment or personal service contracts where the court is slow to decree specific performance due to the undesirability of compelling parties to maintain an ongoing relationship. The transaction concerns a sale and leaseback of immovable property where parties' obligations are clearly defined by the agreements with no element of personal service or continuous supervision by the court. The respondent is

essentially seeking to resile from what it now perceives to be an unprofitable bargain but that alone is not sufficient reason for the court to refuse specific performance.

[50] I am fortified in this conclusion by the decision in *Sekemas Sdn Bhd v. Lian Seng Co Sdn Bhd* [1989] 2 CLJ 142; [1989] 1 CLJ (Rep) 154. In that case, the Supreme Court had to determine whether specific performance should be granted to enforce a sale and purchase agreement for land. Despite the purchaser's inability to pay the balance purchase price due to financial difficulties, the Supreme Court upheld the order for specific performance. The court held that the mere fact that the agreement contained a liquidated damages clause did not mean that damages were an adequate remedy or that the parties had agreed that damages would be the sole recourse for breach. Importantly, the Supreme Court affirmed that in land sale contracts, the burden is on the defendant to rebut the statutory presumption under s. 11(2) of the Specific Relief Act 1950 that monetary compensation cannot adequately relieve the breach. No such rebuttal having been made out, specific performance was rightly ordered. Applying the principles in *Sekemas*, I find the respondent has failed to discharge its evidential burden of showing why damages would be an adequate remedy in this case concerning the sale and leaseback of the property.

[51] Further, in *Ang Siew Hong & Anor v. Ang Wee Kiat* [2020] CLJU 731; [2020] 1 LNS 731, the principles applied by the High Court fortify the conclusion that the respondent should be compelled to specifically perform the contract embodied in the letter of offer dated 20 March 2023. Akin to *Ang Wee Kiat*, the respondent cannot resile from the concluded bargain merely by stating the transaction no longer "aligns with its business plan", as mentioned in their solicitors' letter dated 31 July 2023. Having voluntarily accepted the letter's terms after being duly advised by the solicitors at Messrs Zaid Ibrahim & Co, a leading Malaysian firm, the respondent is bound by those terms. Upholding commercial certainty requires parties be held to lawfully concluded agreements unless exceptional circumstances justify non-performance, which is not the case here based on the evidence of active fulfillment of the letter's conditions precedent. The court ought not to permit the respondent to withdraw from contractual obligations simply because the bargain appears financially disadvantageous in hindsight. As recognised in *Ang Wee Kiat*, reneging due to pecuniary prejudice alone does not constitute a valid defence when a binding contract was struck. The respondent has not shown vitiating factors to render specific performance inequitable or oppressive. Conversely, damages would be inadequate for the applicant who committed resources towards completion, expecting the rental income from leasing back the property. Therefore, the respondent's reason of non-alignment with business plans cannot justify withholding the order sought by the applicant.

[52] In the present case, the sale and leaseback of the property ought to have been completed by the respondent signing the agreements as agreed. The respondent ought not to be allowed to evade its contractual obligations by relying on a unilateral change of business plans that is unsupported by cogent evidence. The respondent has not shown any vitiating factors that would render the decree of specific performance inequitable, oppressive or unjust. On the contrary, damages would not be an adequate remedy for the applicant, who had already committed considerable time and expense towards completion in the expectation of the rental income stream from the long-term leaseback of the property.

[53] Further, s. 11(2) of the Specific Relief Act 1950 mandates that the court presumes that damages are an inadequate remedy for breach of contracts relating to immovable property unless proven otherwise. The respondent has failed to adduce any evidence to rebut this presumption or to show that the justice of the case warrants the court exercising its discretion to refuse specific performance.

[54] On a consideration of the evidence in totality and on a balance of equities, I find that the justice of the case demands the grant of specific performance to compel the respondent to sign and complete the agreements. The applicant has successfully established a concluded contract for the sale and leaseback of the property and demonstrated its continuous readiness and willingness to perform its obligations thereunder. The respondent has not shown any valid reason for the court to exercise its discretion to refuse specific performance. Therefore, pursuant to ss. 11, 20 and 21 of the Specific Relief Act 1950, I grant orders for specific performance as prayed for paras. (a), (b), (c) and (f).